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FILED
MAR 16 1992
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MARIN COUNTY CLERK
By
RECEIVED
MAR 16 1992
HUB LAW OFFICES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

CHURCH OF SCIENTOLOGY INTERNATIONAL, a California not-for-profit religious corporation, Plaintiff, vs. GERALD ARMSTRONG; DOES 1 through 25, inclusive, Defendants.	CASE NO. 152 229 PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY OR TRANSFER TO LOS ANGELES SUPERIOR COURT; REQUEST FOR SANCTIONS DATE: March 20, 1992 TIME: 9:00 a.m. DEPT: 4 No Trial Date

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I. INTRODUCTION

In a remarkably brazen display of "forum shopping," defendant Gerald Armstrong now asks this Court to transfer this action to another court which not only has already ruled that it did not have jurisdiction to adjudicate the matters presented in plaintiff's complaint, but did so at Armstrong's own urging. In December, 1991, plaintiff Church of Scientology International sought, via the very contractual provision now relied upon by Armstrong, to enforce the settlement agreement at issue here, in Los Angeles Superior Court. Armstrong, through his attorney, argued that the contractual provision granting jurisdiction to the Los Angeles Superior Court was invalid, and that the action could not proceed because the court also lacked personal jurisdiction over Armstrong, a resident of Marin County. Armstrong prevailed; the Los Angeles Court ruled that it lacked jurisdiction to hear the Church's motion to enforce the settlement agreement. Under the twin doctrines of collateral and judicial estoppel, Armstrong is bound by both his own arguments and the Los Angeles Court's ruling. He may not, now that the Church has come to his home county of Marin and obtained a temporary restraining order, assert that what he really meant was that he would rather argue the matter in Los Angeles.

This court is plainly the proper court for the trial of this matter. Armstrong's venue motion is brought in bad faith, because it deliberately and directly contradicts arguments which he earlier made in judicial proceedings on the same issue. His motion is interposed not merely to avoid a hearing on the merits of plaintiff's request for a preliminary injunction, but also to

avoid the necessity of answering plaintiff's sworn complaint. Any answer by Armstrong must of necessity admit the actions which constitute his breaches of the Agreement. By interposing a motion for transfer not grounded in law, Armstrong seeks to postpone the inevitable determination by a trier of fact that he has, in fact, breached his agreement. Accordingly, plaintiff requests: (1) that Armstrong's motion be denied; (2) that Armstrong and his attorney pay to plaintiff its reasonable costs and attorneys' fees expended in defense of this motion and (3) that Armstrong be required to file and serve his verified answer in this matter no later than 5:00 p.m. on March 23, 1992.

II. STATEMENT OF FACTS

Because of the many misstatements of fact contained in Armstrong's moving papers, coupled with masses of irrelevant material,[1] plaintiff offers the following brief statement of relevant facts, properly supported by relevant evidence, on which the Court may base its resolution of the motion.

This is an action for breach of contract and injunctive relief, filed by plaintiff Church on February 4, 1992. The

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[1] Armstrong offers pages of inflammatory and insulting argument and masses of irrelevant and unauthenticated materials in an effort to convince this Court that plaintiff is somehow "bad" and thus unworthy of obtaining relief of any sort. Armstrong's false allegations about plaintiff's religion, alleged character defects, purported past actions and/or supposed policies are irrelevant to any consideration of whether or not this action has been brought in the proper court. By inundating the Court with these materials, Armstrong apparently hopes to convince the Court that the matters before it are hopelessly complex. Plaintiff is confident that the Court will not be swayed by these improper tactics. Nonetheless, plaintiff moves to strike defendant's Exhibits 1-Q; 2-A and 2-B filed by defendant. The documents are not properly authenticated, and more prejudicial than probative. Evidence Code §352. Defendant's exhibit 1-Q is a particularly transparent and blatant attempt to prejudice the court.

contract at issue is a Mutual Release and Settlement Agreement (the "Agreement") executed by the Church of Scientology International and defendant Gerald Armstrong in Los Angeles, California in December, 1986. [Verified Complaint; Ex. 2A in Support of Plaintiff's Motion for Preliminary Injunction (hereinafter "Agreement, ¶ _") ¶ 2] The Church has fully performed its obligations pursuant to the Agreement, paying to Armstrong's attorney a large sum of money, which that attorney then distributed to Armstrong along with several other litigants whose cases were settled at the same time. [Id., ¶ 3.] The Verified Complaint delineates specific breaches of the Agreement by Armstrong, and seeks relief in the form of liquidated damages and a permanent injunction. The Church brought a motion for preliminary injunction at the same time that the Complaint was filed. That motion is now set for hearing on March 20, 1992.

The Agreement contains a provision which purports to authorize continuing jurisdiction of the Los Angeles Superior Court following dismissal of the underlying action, for purposes of enforcing the Agreement. [Agreement, ¶ 20][2] Accordingly, on October 3, 1991, the Church brought a motion to enforce the terms of the Agreement to that Court. After substantial delay by

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[2] Paragraph 20 provides: "Notwithstanding the dismissal of the lawsuit pursuant to Paragraph 4 of this Agreement, the parties hereto agree that the Los Angeles Superior Court shall retain jurisdiction to enforce the terms of this Agreement. This Agreement may be enforced by any legal or equitable remedy, including but not limited to injunctive relief or declaratory judgment where appropriate. In the event any party to this action institutes any action to preserve, to protect or to enforce any right or benefit created hereunder, the prevailing party in any such action shall be entitled to the costs of suit and reasonable attorney's fees."

Armstrong, that motion was heard on December 23, 1992. Contrary to Armstrong's self-serving assertions, the precise issue which he presented to that Court was whether or not Paragraph 20 of the Settlement Agreement was sufficient to confer jurisdiction on the Los Angeles Superior Court. After full briefing and argument - in which Armstrong argued vigorously that the provision was insufficient to confer jurisdiction on the Court, and that the Church's motion could not be heard on its merits because the Court lacked personal jurisdiction over Armstrong - Judge Geernaert held that Paragraph 20 did not confer jurisdiction on the Los Angeles Superior Court.

Armstrong filed both a regular opposition to the motion and a supplemental opposition. Incredibly, Armstrong attached a copy of this opposition to support the instant motion. Evidence in Support of Defendants' Motion to Dismiss, Stay, or Transfer Action to Los Angeles (hereinafter "Defs. Ex. __"), Exhibit 1-N. In the supplemental opposition, Armstrong argued vigorously that the Los Angeles Superior Court did not have jurisdiction to hear the Church's motion. Armstrong maintained that jurisdiction could not be conferred on the Los Angeles Court by virtue of Paragraph 20 of the Agreement, insisting, "Turning to the effect of the parties' agreement that the Court retain the power to enforce the settlement, that 'grant' of jurisdiction is not effective: litigants do not have the power to confer jurisdiction upon the courts." [Ex. N at iii.] Armstrong further argued that the Los Angeles Court lacked personal jurisdiction over him as well, maintaining that "Judge Breckenridge's decision is now final for all purposes and there is no longer any jurisdiction

over Mr. Armstrong in this action." [Id. at viii]

At oral argument, Armstrong's counsel was even more vociferous in her insistence that Paragraph 20 could not confer jurisdiction on the Los Angeles Court, arguing:

> [I]t only goes to the concept that the parties are under the misapprehension that they could confer jurisdiction by merely putting it in their settlement agreement.
>
> That is the erroneous concept upon which a lot of the moving parties' arguments seems to be based.
>
> Mr. Armstrong, not an attorney writing this in pro per, had no reason to question whether it was or was not the legitimate effect of conferring jurisdiction.

[Defs. Ex. 1-A, Transcript of Proceedings, December 23, 1991, pp. 54:28 - 55:8]

After lengthy argument, Judge Geernaert concurred with Armstrong, and ruled that he lacked jurisdiction to decide the motion presented by the Church:

> THE COURT: So basically, I am concluding, I think, that 664.6 does not grant this Court jurisdiction over Mr. Armstrong personally or jurisdiction to, quote, enforce the agreement; nor does 127(a)(4) in that there never was an order by Judge Breckenridge requiring the parties to perform the agreement.
>
> * * *
>
> MR. HERTZBERG: I take it your honor is denying our motion, then, on the basis of lack of jurisdiction?
>
> THE COURT: I think that is what it comes down to.

[Defs' Ex. 1-A, Transcript of Proceedings, pp. 63:5-10; 63:16-18 (emphasis supplied)] Indeed, Judge Geernaert specifically analyzed the provision in the Agreement purporting to confer jurisdiction upon his Court, and ruled that, at Armstrong's urging, that it was insufficient to do so:

> THE COURT: The first motion is denied on the basis that Judge Breckenridge did not sign an order or make an order requiring the parties to perform the

document entitled "Mutual Release of All Claims and Settlement Agreement"; nor did Judge Breckenridge sign any order reserving jurisdiction in the Court in this case to enforce said agreement.

The Court is aware that the parties stipulated in their, "Joint Stipulation of Dismissal," quote, page 2, lines 5 and 6, "This Court shall retain jurisdiction and may reopen this case at any time for the purpose of enforcing said agreement."

And further it appears that Judge Breckenridge may have been aware of that agreement between the parties; but it nevertheless appears that Judge Breckenridge was not asked to and did not order the parties to perform the agreement; nor did he order continuing jurisdiction as the parties evidently desired him to do.

The Moving Party asserts that this Court has jurisdiction to grant this motion pursuant to C.C.P. 127(a)(4) . . . However, [that section] relates to compelling obedience to its judgments, orders and process. And, as indicated, there is no judgment or order herein.

During the proceedings Moving Party also relied upon Section 664.6 of the Code of Civil Procedure; however, it appears that on December 11, 1986 this action was dismissed with prejudice. Therefore, this Court lacks jurisdiction under 664.6 of the Code of Civil Procedure since this section ceases to be a jurisdictional basis after entry of judgment or judgment of dismissal for the reasons and on the grounds set forth in the notes of the official court reporter.

Id. pp. 63:22-28; 64:1-12; 65:1-13 (emphasis supplied).[3]

Armstrong was a resident of Los Angeles at the time in which

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[3] In his moving papers, Armstrong makes much of Judge Geernaert's observation that it was likely that the settlement agreement had not been filed with Judge Breckenridge at the time of the settlement. [Moving Papers at 4] As is apparent from the Court's ruling, quoted here by plaintiff, whether or not the agreement was filed in Los Angeles is completely irrelevant to the determination of this motion, or, indeed, to any motion before this Court. What is relevant here is what defendant did not disclose to this Court: that Judge Geernaert reviewed the very provision of the Agreement which Armstrong urges here is sufficient to act as a preclusive choice of forum provision, and found it insufficient to confer jurisdiction on the Los Angeles Superior Court.

the Los Angeles action was dismissed. He was not a resident of Los Angeles when Judge Geernaert ruled that the Los Angeles Court did not have personal jurisdiction over Armstrong. Armstrong is not presently a resident of Los Angeles; he now makes his home here in Marin County. [Verified Complaint, ¶ 6]

This case thus comes before this Court only after the plaintiff sought relief in the Los Angeles Court, and was denied that relief because the defendant successfully argued that the settlement agreement at issue did not confer continuing jurisdiction on the Los Angeles Court. Now that plaintiff has sued defendant in his own home county, defendant would, by this motion, seek to have this action returned to a Court which has already held that it did not have jurisdiction over defendant's person.

III. THE DOCTRINES OF COLLATERAL AND JUDICIAL ESTOPPEL PRECLUDE ARMSTRONG FROM ARGUING THAT THIS ACTION SHOULD BE TRANSFERRED TO LOS ANGELES COUNTY

Having successfully maintained that the Los Angeles Court did not have jurisdiction, Armstrong may not now ask this Court to revisit that question, and find in precisely the opposite fashion. Armstrong is prevented from assuming this contradictory pose by two fundamental doctrines designed to ensure the integrity of the judicial process: collateral estoppel and judicial estoppel.

California cases hold that the doctrine of collateral estoppel

> [B]ars relitigation of an issue decided at a previous proceeding "'if (1) the issue necessarily decided at the previous [proceeding] is identical to

> the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].'"

Mueller v. J.C. Penney Co. (1985) 173 Cal.App.3d 713, 718-719, 219 Cal.Rptr. 272, 277, quoting, People v. Sims (1982) 32 Cal.3d 468, 484, 186 Cal.Rptr. 77, 651 P.2d 321.

No clearer case of collateral estoppel is likely to be found that this one. Each of the elements of collateral estoppel is present here. First, the issue which Armstrong has raised in his motion for transfer -- whether or not Paragraph 20 confers jurisdiction on the Los Angeles Superior Court[4] -- has already been decided in a previous proceeding between these parties. On December 23, 1991, in the Los Angeles action, Judge Geernaert ruled that it did not. [Defs. Ex. 1-A at 64-65; Plaintiff's Ex. 1-A.] After having successfully argued to Judge Geernaert that Paragraph 20 was insufficient to confer jurisdiction on the Los Angeles Superior Court [Defs. Ex. 1-A, p. 64-65], Armstrong is now attempting to convince this Court that the same paragraph is "a forum selection clause" which "requires [this] court to decline jurisdiction." Moving Papers at 8-9. This question is identical to that decided by Judge Geernaert. [See Part II, pages 4 - 8, supra]

Second, Judge Geernaert's decision is final. Armstrong may not challenge it, because it was made at Armstrong's urging.

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[4] After having successfully argued to Judge Geernaert that Paragraph 20 was insufficient to confer jurisdiction on the Los Angeles Superior Court [Defs. Ex. 1-A, p. 64-65], Armstrong now hopes to convince this Court that the same paragraph is "a forum selection clause" which "requires [this] court to decline jurisdiction." Moving Papers at 8-9.

Plaintiff has not challenged the ruling. Indeed, plaintiff accepted the ruling as a valid ruling, and instead instituted this action to try to obtain relief from Armstrong's breaches in the court with both personal and subject matter jurisdiction.

Finally, the party against whom collateral estoppel is asserted - Armstrong - was himself a party to the previous proceeding. Indeed, in the previous proceeding, Armstrong was victorious. Under these circumstances, collateral estoppel precludes this Court from any finding save that Paragraph 20 does not confer jurisdiction on the Los Angeles Superior Court.

Indeed, under the doctrine of judicial estoppel, Armstrong is additionally barred from assuming the contrary position which he urges here. A party may not reverse a position taken in earlier litigation merely to obtain some perceived tactical advantage. Matek v. Murat (C.D. Cal. 1986) 638 F.Supp. 775, 782-783; Scarano v. Central R. Co. of New Jersey (3d Cir. 1953) 203 F.2d 510, 512-13. Judicial estoppel precludes a party from playing "'fast and loose with the courts' by 'intentional self-contradiction. . .as a means of obtaining unfair advantage.'" Coleman v. Southern Pacific Co. (1956) 141 Cal.App.2d 121, 296 P.2d 386, 392.

The Ninth Circuit has explained the policies behind application of judicial estoppel as follows:

> The policies underlying preclusion of inconsistent positions are "general consideration(s) of the orderly administration of justice and regard for the dignity of judicial proceedings. . . ." The emphasis is not on a hard and fast rule, but rather on prevention of "intentional self-contradiction. . .as a means of obtaining unfair advantage."

State of Arizona v. Shamrock Foods Co. (9th Cir 1984) 729 F.2d

1208, 1215 (citations omitted); cert. denied, 469 U.S. 1197, 105 S.Ct. 980 (1985).

In December, in Los Angeles, Armstrong was faced with a meritorious motion to enforce the settlement agreement into which he had entered in 1986, a motion which Armstrong could not refute on the merits, because he had admitted the conduct alleged. To avoid a determination on the merits, Armstrong urged that the Los Angeles Court no longer had jurisdiction over him: he was now a resident of Marin, and the "forum selection clause" contained in the Agreement was insufficient to confer jurisdiction on the Los Angeles Court. Correctly or not, the Los Angeles Court agreed that it had no jurisdiction. Now, faced with a meritorious motion for preliminary injunction and a complaint whose allegations he must, when he answers, admit to be true, Armstrong has taken a complete about face, and argues he may invoke that the same "forum selection clause" to require this Court to decline jurisdiction, and send the matter back to Los Angeles. It is precisely this sort of audacious about-face - all to prevent plaintiff from obtaining its day in court on the merits of its claim - which the doctrine of judicial estoppel precludes.

IV. ARMSTRONG'S MOTION IS INTERPOSED IN BAD FAITH TO DELAY RESOLUTION ON THE MERITS AND TO FORUM SHOP

Armstrong argues that two Code provisions permit him to bring this outrageous motion. Neither apply.

C.C.P. §418.10(a)(2) provides that a party may notice a motion "to stay or dismiss the action on the ground of inconvenient forum." Section 418.10 codifies the common law of forum non conveniens. It simply recognizes the Court's power to

refuse to exercise jurisdiction when "substantial justice" requires that the case be tried in another state or country. Goodwine v. Superior Court (1965) 63 Cal.2d 481, 47 Cal.Rptr. 201, 203, 407 P.2d 1. It is a motion generally made by a non-resident defendant unwilling to proceed in California. Here, defendant quibbles not with the state of plaintiff's choosing, but with the county. Yet plaintiff has brought this action in defendant's home county. Armstrong has easily retained counsel to represent him in Marin -- his employer -- and claims to suffer no inconvenience concerning the availability of witnesses or evidence. Indeed, Armstrong has already noticed the depositions of four individuals he claims are witnesses in this action, all to take place in Marin. [Plaintiff's Exs. 2-A, 2-B, 2-C and 2-D] Absent a showing of serious inconvenience to the defendant, plaintiff's choice of forum cannot and will not be disturbed on forum non conveniens grounds. Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal.App.3d 372, 202 Cal.Rptr. 773.[5]

Armstrong's urging that this Court is not the "proper court" pursuant to C.C.P. §396b is equally frivolous. Section 395(a) provides in relevant part that "the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action." In addition, in an action such as this one for breach of contract, proper counties also include the county in which the contract was

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[5] The case law is clear that plaintiff's right to choose the place of suit will not be disturbed unless a suitable alternative forum is available to the plaintiff elsewhere. Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal.App.3d 372, 383, 202 Cal.Rptr. 773, 779-780.

entered into and the county in which the contract is to be performed. Id. Here, Armstrong resides in Marin. Moreover, plaintiff contends that Armstrong's obligations under the Agreement are personal and continuing, making Marin one of the counties in which performance should occur. Armstrong's argument that paragraph 20 of the Agreement changes these statutory venue provisions and renders Los Angeles the only "proper" county is frivolous and offered in bad faith. As demonstrated in Part III, supra, Armstrong has already convinced the Los Angeles Court that it has no jurisdiction at all.

Contrary to Armstrong's assertion that plaintiff made no response to his counsel's threat that he would bring this improper motion, plaintiff's counsel responded by outlining in detail for Armstrong's counsel the impropriety of his position. [Plaintiffs' Ex. 2-E, Letter to Ford Greene from Andrew Wilson] In that letter, plaintiff's counsel delineated the arguments made more fully here: that Armstrong was precluded from claiming Los Angeles as the proper court because he had already successfully convinced the Los Angeles court to deny jurisdiction. Plaintiff's counsel also noted that Greene had already demonstrated a bad-faith attempt at forum shopping when, after Judge Stephens refused to give Armstrong a desired continuance, Armstrong raised a peremptory challenge, drawing this Court. Plaintiff's counsel warned Mr. Greene that the strong inference to be drawn was that Armstrong intended to bring his venue motion now merely to try to avoid a second judge who had ruled in a manner unfavorable to him. Finally, Mr. Wilson warned Mr. Greene that, while he rarely sought sanctions, if Mr. Greene insisted on

bringing this obviously frivolous motion, plaintiff would indeed seek sanctions for resisting it. Under these circumstances, plaintiff is entitled to recover its reasonable expenses and attorneys' fees pursuant to C.C.P. §396b(b), Mission Imports, Inc. v. Superior Court of the City and County of San Francisco (1982) 31 Cal.3d 921, 932, 184 Cal.Rptr. 296, 302, 647 P.2d 1075 (Award of sanctions by trial court upheld when motion for change of venue made under C.C.P. §396b "lacked any legal foundation given the facts it knew or should have known...").

Moreover, Armstrong interposed this motion for yet another improper reason. The answer to plaintiff's verified complaint was due on the very day on which defendant filed and partially served this motion.[6] By filing this frivolous motion, Armstrong avoided the necessity of answering the complaint and admitting, as he must, the veracity of its allegations which are precisely the facts that he didn't deny in the Los Angeles proceeding. Armstrong's failure to answer was thus calculated to impede plaintiff's motion for preliminary injunction, and force plaintiff to prove facts which would otherwise have been deemed admitted. Under these circumstances, plaintiff is also entitled to an additional order that Armstrong file and serve his answer or other responsive pleading in this matter no later than 4:30 p.m. on Monday, March 23, 1992.

V. CONCLUSION

Defendant's motion to dismiss, stay or transfer this action is frivolous, and brought with improper motives. The Los Angeles

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[6] Plaintiff's counsel Laurie J. Bartilson has to this date never been served with Armstrong's moving papers.

Superior Court has already determined that Paragraph 20 of the Agreement does not confer jurisdiction upon it, as urged by plaintiff here. Moreover, in Los Angeles plaintiff urged the opposite of the position he has taken before this Court. This is plainly a proper court for defendant, and convenient to him, because it is the county in which both he and his counsel reside. Armstrong's motion is simply an attempt to forum-shop, and to avoid filing an answer to plaintiff's meritorious complaint. Under these circumstances, Armstrong's motion should be denied, Armstrong ordered to pay to plaintiff reasonable fees and expenses, and Armstrong ordered to file a pleading responsive to plaintiff's complaint on or before March 23, 1992.

Dated: March 16, 1992

Respectfully submitted,

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